No. 20128

In the

United States Court of Appeals

for the Ninth Circuit

David S. McDaniel, doing business as McDaniel Plumbing & Heating Company,
Appellant,

vs.

Ashton-Mardian Company (Joint Venture), and Travelers Indemnity Company, a corporation,
Appellees.

Appellees' Brief

Hall, Jones, Hannah & Trachta
By Ben C. Birdsall
By Russell E. Jones
1010 Valley National Building
Tucson, Arizona
Attorneys for Appellees

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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STATEMENT OF FACTS

Appellees were defendants in the trial court and will adopt appellant's style of referring to themselves as a singular defendant (meaning in all instances Ashton-Mardian Company, the joint venture, since the defendant bonding company is a passive defendant), and to appellant as plaintiff.

Defendant controverts the statement of facts contained in plaintiff's brief only to the extent of stating as clearly and affirmatively as it knows how, that it believes the following are established facts which are important here in order to properly present the case and their argument.

1. The delay, which is the subject matter of plaintiff's claim, was not caused by any wrongful act or default of defendant, but resulted entirely from changes ordered by the United States (T. 27, T. 33).

2. The changes required by the United States in which time extensions were granted were changes which the United States had a right to make and defendant had a duty to perform and were not "cardinal changes."*

3. The defendant did not guarantee or warrant that plaintiff would be able to complete its subcontract within any certain period of time.†

Each of these matters is decided by the trial court which had before it the stipulation of the parties, in which they agreed on certain facts, and the exhibits consisting of all the lengthy presentation to the various administrative boards and their decisions which were attached thereto for whatever purpose the trial court might make of them and from which it must have determined its findings. None of the facts stated above are specified as error by plaintiff, but except for quoting the decision of the trial court they are not otherwise set forth as such in the plaintiff's statement of the case and he seems to ignore their existence throughout his argument, as, for example, in his argument I (page 13) where he states: "Any contractor delayed in his work *by action of the other contracting party* . . ." (Emphasis supplied.) This is obviously contrary to fact 1 as stated above.

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*Decision of the Engineers Board, Exhibit 9, to the stipulation, which holds, with reference to Change Order 4 (the Arctic Tower), on page 19, "no 'cardinal change' is involved," and on page 20 the same with reference to Change Order 5 (the changed sub-soil condition), which is affirmed by the decision of the Armed Services Board, Exhibit 16, page 7. Also T. 33.

†General contract, Exhibit 1; subcontract, Exhibit 2, T. 32.

SUMMARY OF ARGUMENT

After attempting other approaches the defendant believes its argument is most clearly presented by an analysis of plaintiff's argument in the approximate same order as presented in his brief.

On page 12 thereof he lists the only two questions involved in this appeal as follows:

> "1. If a subcontractor agrees to do work for a general contractor within a fixed period of time, and is thereafter required to extend his services for a much longer time at loss to himself and without his own consent or benefit, is he entitled to recovery for the delay?"

Defendant's answer to this question is negative unless there is added thereto, as plaintiff does in his argument, the phrase, "from the party legally responsible for the delay which causes the damage," or other language having the same meaning. *The delay in this case was not caused by the defendant.* And legal responsibility must be found in contract or tort. *Neither is present here.*

> "2. If the foregoing question may be answered in the affirmative as a general principle, is there anything in this contract, or on these facts, to take this case out of the general rule?"

Defendant believes the following facts assumed in the first question are not present in this case by reason of the parties' contract and the facts:

a. There was no fixed period of time.

b. The plaintiff did consent to delay (first, and most important, in the contract; second, at the time of the changes which produced the delay).

c. Plaintiff did benefit.

These reasons are of course in addition to the defenses that the delay was not caused by defendant and that the con-

tract contains no provisions for such damages, nor can they be implied.

ARGUMENT

Replying to plaintiff's argument, it is noted that in his summary (page 12), he states the general principle of law upon which he relies to be that a subcontractor is entitled to recover delay damages regardless of their cause. However, when he begins his actual argument on page 13, he adds the language, "by virtue of the act of the other contracting party." Plaintiff does not cite, nor has defendant found, any decisions which state this legal proposition without at least the latter qualifying language. Plaintiff's own quotations appearing in his brief each contain such language. On page 13, the quotation from Corbin (5 Corbin on Contracts 429), ". . . due to the owner's causing unreasonable delay . . ." The reference is of course to the claim of a general contractor against an owner. In the quotation from *Grand Trunk Western R. Co. v. H. W. Nelson Co.,* 116 F. 2d 823, ". . . when without his fault the other party, during the progress of the work, delays it . . . by the action of the party at fault," and on page 14 in the quotation from *Northeast Clackamas C. E. Co-op v. Continental Cas. Co.,* 221 F. 2d 329, ". . . the owner cannot delay or retard the contractor . . . and, if through the act or omission of the owner . . .", and finally in the quotation from *Frank T. Hickey, Inc. v. Los Angeles Jewish Com. Coun.,* 276 P. 2d 52, ". . . the contractor who is in control of the work being performed."

The recent Wyoming decision cited by plaintiff, *Studer v. Rasmussen,* 344 P. 2d 990 (Wyo., 1959), which is almost exactly in point since it involves a subcontractor plaintiff and a contractor defendant, a Federal government contract, and a claim for delay damages, states clearly at page 997

of the Pacific Report: "We may concede that if the appellants (the contractor) had been hindered in their work by the government or by circumstances beyond their control, then no damage should have been awarded." The decision awarding the subcontractor damages turns on a finding (not present here) that the contractor was negligent, and therefore in breach of the subcontract.

We therefore proceed with our argument based on the affirmance of this proposition only with the additional language added thereto.

Next, plaintiff states in his argument II that the trial court erroneously failed to apply the general rule as stated in his argument I. At this point, he recognizes both in his summary and in the argument following that his general rule does not apply if a party has waived it. Whereas, it is our position that he did so waive any right to recover under this principle, it is first of all defendant's contention that he does not come within the application of the principle in the first instance because the delays were not caused by any acts of the defendant.

Enlarging upon the point just made, the trial court found that the defendant's delay was caused by change orders which the government had the right to make and which the defendant was bound to perform, and we believe plaintiff now concedes this. The provisions of the general contract (Exhibit 1, General Provisions, Clauses 3, 4 and 5), giving the government this right, have been considered in many decisions and it is well settled that they will be enforced, and that the government, by virtue thereof, may make changes which are within the general scope of the contract (Clause 3) or necessitated by changed conditions (Clause 4), and incur no liability for delays by reason thereof, excepting only an equitable extension of the time for performance (Clause 5).

United States v. Rice, 317 U.S. 61, 63 S. Ct. 120, 87 L. Ed. 53, which held that the changes made pursuant to similar contract provisions did not breach the contract, and that the right to make the changes was a part thereof, and any damage by reason of delay caused thereby was not compensable except that the government would be required to extend the time for completion.

Choteau v. United States, 95 U.S. 61, 24 L. Ed. 371, which held that the government would be liable for the reasonable cost and expenses of the changes made but not for damages for delay occasioned thereby.*

United States v. Foley, 329 U.S. 64, 67 S. Ct. 154, 91 L. Ed. 44. This decision overruled the Court of Claims which had permitted the contractor to recover for damages due to delay extending beyond more than twice the original time contemplated.†

Also see *Wells Bros. Co. of New York v. United States,* 254 U.S. 86, 65 L. Ed. 148, 41 S. Ct. 34, *Brooker Engineering Co. v. Grand River Dam Authority,* 144 F. 2d 708, *C. A. Hooper v. United States,* 40 F. Supp. 491 (1941).

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*The Choteau decision states in part at page 373 of the L. Ed. opinion: "It is very clear that both parties contemplated the probability that the work would not be completed at the precise period of 8 months from the date of the contract. They also contemplated that changes would be made. . . . They made such provision for these matters as they deemed necessary for the protection of each party. For the reasonable costs and expenses of the changes made in the construction, payment was to be made; but for any increase in the cost of the work not changed no provision was made."

†Page 155 of the 67 S. Ct. Report: "Here, as in the former cases." (citing *United States v. Rice,* supra, and *Crook v. United States,* 270 U.S. 4, 46 S. Ct. 184, 70 L. Ed. 438) "there are several contract provisions which showed that the parties not only anticipated that the Government might not finish its work as originally planned, but also provided in advance to protect the contractor from the consequences of such governmental delay, should it occur. The contract reserved a governmental right to make changes in the work which might cause interruption and delay, required respondent to coordinate his work with the other work being done on the site . . ."

Recent decisions of the Court of Claims follow these decisions:

Commerce International Company, Inc. v. United States, (1964), 338 F. 2d 81, 85:

> "It is settled, of course, that mere delay, per se, incident to the government's making work or material available to a contractor is not compensable, in a claim for breach of contract, without a specific warranty . . . Absent a warranty the contractor's recourse for mere delay is to seek an extension of the time of his performance."

Laburnum Construction Corp. v. United States, (1963) 325 F. 2d 451, 457: "Plaintiff would have no right to complain if the defendant's exercise of its reserved right to make changes set its work schedule awry." Citing *J. A. Ross & Co. v. United States,* 115 F. Supp. 187, 126 Ct. of Claims 323.

Gilbane Building Company v. United States, (1964) 333 F. 2d 867, 869:

> "The issue then is, whether defendant is liable for Raymond's delay even though it did not wrongfully cause it. Such liability, if it exists at all, must be found in the express language of the contract; it cannot arise solely by implication."

This case contains an excellent discussion and analysis of the law and contract provisions similar to ours.

All of these decisions involving the general and the government are just as applicable where the parties are the general and a sub. But for a recent decision involving the latter see *Southern Fireproofing Company v. R. F. Ball Constructing Company, Inc.* (1964), 334 F. 2d 122. In that decision the court found that plaintiff subcontractor could not recover for delay unless expressly provided in the con-

tract and then only if it was the fault of the defendant contractor. The decision further holds that the contract documents under examination almost exactly the same as ours contained no time guarantee.

Of course, the fact that the defendant cannot recover from the United States for the delays caused by the government's change orders has been fully determined and exhausted in the administrative proceedings to which plaintiff refers in his brief.

We have presented the foregoing at some length for the reason that the defendant's next position is that the plaintiff is bound by these provisions of the general contract and the applicable law as well as defendant.

Plaintiff contends the provisions incorporating the general contract into the sub are vague. (Page 17 of plaintiff's brief.) Yet, on page 2 of his statement of facts he says: "The subcontract was expressly made subject to the main contract." We submit that in this regard it would be difficult to draft language which is more clear or comprehensive. The very first language in the subcontract, Exhibit 2 and T. 5, is:

> "This Agreement made this 30th day of March, 1956, by and between Ashton-Mardian Company, hereinafter called the Contractor, and McDaniel Plumbing & Heating Company, hereinafter called the Sub-Contractor,
>
> WITNESSETH:
>
> That the Contractor and the Sub-Contractor for the consideration hereinafter named, agree as follows:
>
> "Section 1. The Sub-Contractor agrees to furnish all labor, material, equipment and tools to perform all work as described below, in accordance with the *general conditions of the Contract* (which is available for inspection at all times at the office of the Contractor) *by the Owner and the Contractor* and in accordance

with the drawings and specifications prepared by Corps of Engineers, U. S. Army, hereinafter called the Architect-Engineer, *all of which general conditions,* drawings and specifications signed by the parties thereto are identified by the Architect-Engineer and *form a part of the Contract between the Contractor and the Owner,* dated March 30, 1956, *and hereby becomes a part of this Contract* for AIR FORCE STATION TM-181 at AJO, ARIZONA, for Corps of Engineers, U. S. Army, hereinafter called the Owner:" (Emphasis added.)

In addition, the Court is respectfully referred to the other provisions quoted at length on pages 10-12 of plaintiff's brief. Also, Section 4, Exhibit 2, provides:

> "Section 4. The Contractor and Sub-Contractor agree to be bound by the terms of the Agreement, general conditions, drawings, and specifications as far as applicable to this Sub-Contract and also by the terms and conditions as set forth on the reverse side entitled 'Terms and Conditions,' which are specifically incorporated herein and made a part hereof." (T. 5)

That a general contract may be made a part of the subcontract by such provisions is determined in the case of *Mount Vernon Contracting Corp. v. United States,* 153 F. Supp. 469 (1957). Also see *C. A. Hooper Co. v. United States,* supra, and *Cliffe Co. v. DuPont Engineering Co.,* 298 Fed. 649. This language appears at page 651 of the latter decision:

> "Where a subcontractor undertakes to work according to the original contract with the owner, the two contracts form, in effect, but one contract, and the subcontractor is entitled to the same benefits and bound by the same conditions as the contractor under the original contract . . ."

Also see *Lanehart v. United Enterprises,* 226 F. 2d 359.

Therefore, by the terms of his agreement as expressed in the subcontract, the plaintiff agreed that the government should have the right to make changes by virtue of either clause 3 or clause 4, the latter arising on account of changed conditions, and that if he were delayed by reason thereof he would not be entitled to any damages. This was a part of his bargain and it must be presumed that he received consideration therefor as a part of the benefits conferred upon him in the subcontract. *Choteau v. United States,* supra.

The defendant's next point is that the subcontract itself precludes plaintiff's recovery for delay damages. Again, each of the preceding arguments apply to some extent in this argument. It is difficult, for example, to read the subcontract without reference to the provisions of the general contract. However, the subcontract does contain these additional provisions. Exhibit 2, Terms and Conditions, page 2, paragraph 1:

> "The contractor, at any time before completion and final acceptance of the work may order any changes or alterations in the work required to be performed by the subcontractor."

Paragraph 6 of the same:

> "The subcontractor agrees to fully do and perform this work and in all things execute and complete this contract within the time herein limited for that purpose *or within said term as it may be extended by reason of delay, changes, additions, or other reasons called for or allowed by the contractor and architect and/or engineer . . .*" (Emphasis supplied.)

and paragraph 8:

> "It is the responsibility of the subcontractor to follow the progress of the job."

Paragraph 16, as set forth at length in plaintiff's brief, page 11, contains additional language to the same effect.

Many of the foregoing decisions state as a general principle of law that where parties provide for changes, additions, etc., in their contract that they have also recognized that delays will result and have by reason of their contract agreement precluded themselves from recovery of damages resulting from such delays and waive the same. *United States v. Rice,* supra. *Crook v. United States,* supra. *United States v. Foley,* supra. *Choteau v. United States,* supra. *Brooker Engineering Company v. Grand River Dam Authority,* supra.

In his brief, plaintiff refers the court to *Lichter v. Mellon-Stuart Company,* 193 F. Supp. 216. But this case says at page 220:

> "The controlling principle of law seems to be that absent contractual provisions to the contrary, the contractor is *not liable* to reimburse the subcontractor for the latter's increased costs caused by delays contemplated in the contract, but the contractor is liable in damages when any delay caused by the contractor constitutes a breach of the contract express or implied." (Emphasis added.)

The court holds it was not a breach for the general contractor to direct the sub to do the work as it became available, the contract providing the sub's work should be performed "as required by the progress of the work and as directed by the contractor." (Page 221) The provisions considered by the court in refusing claimant's claim for delay damages were identical for all practical purposes with those in the instant case. The court does award damages with reference to one claim but only where it concludes that the contractor's breach was responsible for the delay.

Defendant turns to another point. The plaintiff's general proposition of law assumes a situation where it has been agreed between the parties that the subcontractor will be able to complete his work within a specified period of time. Although it was contemplated that the work provided in the original contract would take approximately 450 days, this did not constitute a guarantee that the work would not actually be performed over a longer period of time. As has been noted, the contract documents expressly provide for delays. Time is not made of the essence of either contract and time is not generally of the essence in a building contract. The defendant did not warrant or guarantee to the plaintiff that he would be able to complete his subcontract within 450 days. Volume 3A, Corbin on Contracts, 377, Section 720:

> "Construction contracts are subject to many delays for enumerable reasons, the blame for which may be difficult to affix . . . Delays are generally foreseen as probable; and the risks thereof are discounted . . . The complexities of the work, the difficulties commonly encountered, the custom of men in such cases, all these lead to the result that performance at the agreed time by the contractor is not of the essence."

We believe it may also be argued that plaintiff and defendant both knew, or should have known, that it was more probable than not that the government would want many changes in the performance of the contract during its progress. Naturally some of these changes would cause delay. Naturally they would not all require additional plumbing. If defendant was not willing to undertake the risk of damages resulting from such delay, he should not have undertaken the subcontract. He should not now be heard to complain that he did not appreciate these facts of life at

the time he obligated himself to do the work. *Choteau v. United States*, supra.

Plaintiff argues in his brief that the subcontract should be interpreted to make sense; that the question of whether the plaintiff may recover for delay depends upon the reasonable expectations of the parties; that a contract should be given a fair interpretation. We of course agree with these suggestions. We disagree, however, with plaintiff's conclusion. The first contract is between the defendant and the government. It expressly provides that the time required for performance of the contract may be extended for changes and that no delay damages shall result therefrom. Faced with this provision in the general contract, the only logical procedure for the defendant was to protect itself against this possibility in their subcontract. Otherwise, a situation would result whereby the government could , as it did in this case, order changes which lengthened the time of performance and the defendant could recover nothing for any damages occassioned by such delay and yet would be liable to each and every subcontractor whose work was delayed for the completion of said changes. The subcontractor is in no different position from what it would have been in as a separate prime contractor. *Mount Vernon Contracting Corp. v. United States*, supra.

Defendant believes that the argument of plaintiff appearing on pages 16 and 17 of his brief is more persuasive of this conclusion than that reached by the plaintiff. Anyone who has engaged in the construction business to any significant extent knows that changes are more often than not made during the progress of the work; that such changes necessarily in most instances result in delay of performance. The plaintiff not only should have realized this in the instant case but was made aware of it in the provisions